Case No. 22 -

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IN THE
**Supreme Court of the United States**

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CESAR CABALLERO, Individually and as representative of the Miwok Nation (Tribe); MIWOK NATION (TRIBE)

Petitioners,

*v.*

UNITED STATES OF AMERICA,

Respondent and Real Party in Interest,

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CESAR CABALLERO, on behalf of himself and on behalf of true Miwok Class members

Petitioner,

*v.*

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Trial Court and the Court of Appeals committed prejudicial error in barring/blocking a Native American tribe from pursuing *in rem* / quiet title remedies on lands promised and granted to them by the USA from that tribe, but stolen by another tribe based on lack of subject matter jurisdiction due to the non-justiciable political question doctrine.

2. Whether or not, the Court committed prejudicial error by blocking a native American tribe from pursuing an *in rem*/quiet title/stolen tribal lands case, on the basis of USA sovereign immunity tribal sovereign immunity.

3. Whether the waiver by the United States of America of its sovereign immunity over quiet title claims impermissibly discriminates in violation of the Equal Protection Clause of the 14th Amendment against Native American tribes having quiet title claims that are barred by the Native American lands express exceptions set forth in 28 USC section 2409a.

4. Whether the Trial Court and the Court of Appeals committed prejudicial air in barring/blocking the Indian tribes pursuit of Land title claims constitutes an impermissible denial of the right to access to courts as guaranteed by the First Amendment right to

petition the court government for redress of grievances.

## LIST OF PARTIES

The parties below are listed in the caption.

Petitioner Cesar Caballero resides in the Eastern District of California.

Petitioner Miwok Nation (Tribe) has a principal place of business in the Eastern District of California, and is a federally-recognized Native American tribe.

Respondent Shingle Springs Band of Miwok Indians has a principal place of business in the Eastern District of California. It was the Plaintiff/Cross-Defendant in *Shingle Springs Band of Miwok Indians v. Caballero*, USDC EDCA Case No. 08-cv-03133-KJM-AC; Ninth Circuit Case No. 20-16785.

The Shingle Springs Band of Miwok Indians was also the Intervenor in *Cesar Caballero; Miwok Nation (Tribe) v. United States of America* , USDC EDCA Case No. 2:20-cv-00866-KJM-AC; Ninth Circuit Case No. 20-17356.

Respondent United States of America is the Respondent herein, and Real Party in Interest in the lower courts.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Cesar Caballero is a natural person. Petitioner Miwok Nation [Tribe] is a Native American tribe federally-recognized by the United States Bureau of Indian Affairs.

The United States of America is a sovereign nation.

## RELATED CASES

1. *Cesar Caballero; Miwok Nation (Tribe) v. United States of America*, USDC EDCA Case No. 2:20-cv-00866-KJM-AC; Ninth Circuit Case No. 20-17356

2. *Cesar Caballero v. Shingle Springs Band of Miwok Indians*, USDC EDCA Case No. 2:08-cv-03133-KJM-AC; Ninth Circuit Case No. Case No. 20-16785

By this Petition, Petitioners Cesar Caballero on behalf of himself and on behalf of Miwok Nation, and on behalf of true Miwok Class Members, seeks the grant of certiorari in both of these cases [Ninth Circuit case numbers 20-17356 and 20-16785].

*v.*

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## OPINION BELOW

*Cesar Caballero; Miwok Nation (Tribe) v. United States of America*, USDC EDCA Case No. 2:20-cv-00866-KJM-AC; Ninth Circuit Case No. 20-17356

The October 22, 2021 opinion of the United States Court of Appeals for the Ninth Circuit was ordered not for publication. The Ninth Circuit affirmed the November 6, 2021 Decision and November 10, 2021 Judgment of the United States District Court for the Eastern District of California. See Appendices A, C and D, respectively.

Summary of Court Rulings and Ninth Circuit Decision in Shingle Springs Band of Miwok Indians v. Caballero, USDC EDCA Case No. 08-cv-03133-KJM-AC; Ninth Circuit Case No. 20-16785

The October 22, 2021 opinion of the United States Court of Appeals for the Ninth Circuit was ordered not for publication. The Ninth Circuit affirmed the May 20, 2009 Decision on the motion to dismiss Petitioner's counterclaim and August 14, 2021 of the United States District Court for the Eastern District of California. See Appendices B, E and F, respectively.

## STATEMENT OF JURISDISCTION

This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

Petitioners are party Defendants in these actions, and brings this Petition seeking review of the Decision of the United States Court of Appeals for the Ninth Circuit, AFFIRMING the District Court's dismissal of the action.

The Ninth Circuit's opinions in both cases were rendered on October 22, 2021 (See Appendix A and Appendix B hereto).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The non-justiciable political issue involves the Executive Branch's powers under Article II of the US Constitution, Sections 1 ("The executive power shall be vested in the President of the United States of America") and 2 ("Powers of the President, including Commander-in-Chief of the Army and Navy, and the power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur") of the Constitution of United States of America.

2. US Constitution First Amendment right to seek redress of grievances from the government [right to access to the Courts]:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. US Constitution Article I, section 8, clause 3 [right to regulate affairs with Indians]: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"

4. The Fourteenth Amendment of the United States Constitution, section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. 28 USC section 2409a. Real Property quite title actions

"(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This

section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual

commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k)Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or
(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.
(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).
(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.
(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession."

6. 25 USC section 1322(b), Assumption by State of civil jurisdiction, Alienation, encumbrance, taxation, use, and probate of property.:

"(b) Alienation, encumbrance, taxation, use, and probate of property.
Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the

United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

7. 18 USC section 1162(b), State jurisdiction over offenses committed by or against Indians in the Indian country:

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

## STATEMENT OF THE CASE

Summary of Court Rulings and Ninth Circuit Decision in Caballero v. United States, USDC EDCA Case No. 20-cv-00866-KJM-AC; Ninth Circuit Case No. 20-17356

Petitioner Cesar Caballero individually and as representative of the Miwok Nation (Tribe) of Miwok Native Americans, filed an *In Rem* action concerning he and his tribe's rights to occupy, possess and govern lands specifically granted in deeds by the USA to the Miwok Indians. The lawsuit described how the lands in question were stolen by a group of Hawaiian Native Americans, who regularly exclude true Miwok nation members from occupying, residing, controlling the land The lands in question include a substantial by the name of Red Hawk Casino.

The *in rem* complaint was filed as against the land itself, but gave specific notice to the occupying tribe, and to the USA-BIA.

The USA appeared in the case and filed a motion to dismiss the action based on sovereign immunity and non-justiciable political question [Docket No. 14]. It included a declaration of Ryan Hunter of the BIA [Docket No. 14-2], which included a series of deeds, stating the following recipient of the lands [see Title Status Report for Land Area 546, Tract 5023] [attached as part of Declaration of R. Hunter] [Docket Entry #14-6].

> "Tribe: Shingle Springs Band of Miwok Indian, Shingle Springs Rancheria (Verona Tract), California
> Indian/NonIndian: Tribe
> Title: Fee
> Interest: All"

Also, see Title Status Report for Land Area 546, Tract 5595 [attached as part of the Declaration of Ryan Hunter] [Docket Entry #14-7]

> "Tribe: Shingle Springs Band of Miwok Indian, Shingle Springs Rancheria (Verona Tract), California
> Indian/NonIndian: Tribe
> Title: Trust
> Interest: All"

Shingle Springs Band of Miwoks filed a motion to intervene into the case, which Petitioners did not oppose.

Petition filed an opposition to the USA's motion to dismiss. See Docket Entry 15-1 15-2, and 15-3 [Memorandum of Points and Authorities; Declaration of H. Franck; Declaration of H. Caballero].

See especially Exhibit F to the Declaration of H. Franck] [Docket Entry #15-2], Exhibit F thereto, memo regarding data relating to the conveyance of the subject land.

It also included a Declaration of Cesar Caballero.

Caballero filed a Notice of Related Case, which referenced a simultaneous-set appeal from a case by the Shingle Springs Band of Miwok Indians, in which Caballero cross-complaint was dismissed on sovereign immunity and political question grounds [*Shingle Springs Band of Miwok v. Caballero*, USDC EDCA Case No. 08-cv-03133-KJM-AC, 9th Circuit Case No. 20-16785] [the "Shingle Springs case"]. Caballero has filed a simultaneous petition for writ of certiorari in that action as well, and requests that the two petitions be consolidated, as they are indeed related cases.

The Court held a hearing on the motion to dismiss on November 8, 2020, and granted the motion to dismiss based on sovereign immunity of the USA, and a political question non justiciability bar to the action. The Court made the following analysis of its decision to grant the motion to dismiss [See Reporters Transcripts of hearing on USA's Motion to Dismiss Page 13, lines 6-12] [Appendix D hereto]:

> "If the complaint could be amended to address only lands held in fee simple by the tribe, this Court would be required to answer a nonjusticiable question. I'm looking, for that principle, to the Shingle Springs case previously decided, 2020 Westlaw 4734933, where that notion is explained at pages 1 through 4. And therefore I'm granting the motion to dismiss with prejudice and without leave to amend."

The Trial Court stated with regards to Plaintiffs' request for leave to amend [Reporter's Transcript, Page 8, lines 6-21] [Appendix D hereto]:

> "THE COURT: All right. So, Mr. Franck, assume I accept Mr. Scarborough's characterization of the record, assume for sake of argument that I grant the motion to dismiss for lack of subject matter jurisdiction, just so I'm clear, would you be telling me that you would then seek to amend to state claims based only on the 80 acres?
> MR. FRANCK: Your Honor, we did request leave to amend, number one. And --
> THE COURT: I'm asking, would you request leave for that purpose?
> MR. FRANCK: Yes. Yes.
> THE COURT: Any other purpose?
> MR. FRANCK: Yes. To clarify that we do not dispute the USA's title. I would want to say that. Okay.

THE COURT: You've said it. So, this is -- it's in the record."

With regards to the Equal Protection argument, the following exchange took place between Mr. Franck, Plaintiffs/Appellants' counsel, and the Trial Court, page 4, line 15 – page 5, line 10 [Appendix D hereto]:

"MR. FRANCK: Correct, that's what it says, Your Honor, but to exclude a whole race of people would violate the Fourteenth Amendment equal protection clause. I can see by your facial expression you're not impressed with that argument. But what -- why would they just exclude a whole race of people from being able to do what is, in effect, a standard quiet title action? Why not allow us? There is no rational basis, compelling government interest. It's a clear case of race-based discrimination on its face under the facially -- you know, facial impropriety there. So we would just point that out to the Court. We don't agree that that statute should bar it.

THE COURT: I had thought your argument rested fundamentally on a position that the land here, at least the majority of the land, was not held in trust --

MR. FRANCK: No.

THE COURT: -- but the government's record appears to clarify, with some interpretation of documents, that the land is held in trust. So you agree with that? You concede that?

MR. FRANCK: We do, Your Honor. We basically accept the recitation of title documents by Ryan Hunter."

Petitioners filed a timely appeal. Shingle Springs Band of Miwok Indians (falsely described), filed a motion to

intervene in the appeal, which Petitioners did not oppose. The motion to intervene was granted. Petitioners filed their Appellant's Opening Brief. The USA filed a brief in opposition, as did the Shingle Springs Band. The Court of Appeals did not permit a hearing on the appeal, and affirmed the dismissal.

The Court of Appeals found that the action was properly dismissed due to the non- justiciable political question doctrine and based on the USA's sovereign immunity.

The Court found that the waiver of sovereign immunity in 28 USC section 2409a did not apply to Caballero's *in rem* complaint because Native American trust land disputes as excepted from the waiver of sovereign immunity. The Court stated [see Appendix A hereto, [October 22, 2021 Memorandum of Opinion, unpublished, page 2]:

> "The qualified waiver of sovereign immunity in the Act, however, does not apply to trust or restricted Indian lands. 28 U.S.C. § 2409a(a); *see also Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987)."

As to the Fourteenth Amendment Equal Protection argument, the Court of Appeals stated [see Appendix A hereto, [October 22, 2021 Memorandum of Opinion, unpublished, page 3]]:

> "The Act prohibits claims against the United States by *any plaintiff* involving Indian lands. *See* 28 U.S.C. § 2409a(a). The Act does not treat Caballero differently than a non-Indian plaintiff. *See Agua Caliente Tribe of Cupeno Indians of Pala Rsrv. v. Sweeney*, 932 F.3d 1207, 1220 (9th Cir. 2019)."

As to the non-justiciable political question bar to Petitioners' complaint, the Court stated [see Appendix A hereto, [October 22, 2021 Memorandum of Opinion, unpublished, page 3]]:

> "Caballero's claim to the land held in fee simple by the Band was correctly dismissed as posing a non-justiciable political question, as it was premised on the claim that Caballero's group, the Miwok Nation, should have been recognized instead of the Band as representing the Miwok people. This Court generally refuses to "intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence"."

As to Caballero's request for leave to amend to limit his request to one of the parcels which was not held in trust, and thus would not be impacted by the sovereign immunity for Native American trust land, the lands stated as follows [see Appendix A hereto, [October 22, 2021 Memorandum of Opinion, unpublished, page 4]]:

> "For the same reason, the district court did not err in declining to allow Caballero to amend his complaint to limit it to the land held in fee simple by the Band."

Summary of Court Rulings and Ninth Circuit Decision in *Shingle Springs Band of Miwok Indians v. Caballero*, USDC EDCA Case No. 08-cv-03133-KJM-AC; Ninth Circuit Case No. 20-16785

The Ninth Circuit scheduled these two cases on the same date [October 20, 2021] and issued decisions in both cases on the same day [October 22, 2021]. In *Shingle Springs v. Caballero,* the Ninth Circuit's Decision affirms the Trial

Courts Judgment of Dismissal of Caballero's cross-complaint against the Shingle Springs Band, based on Sovereign Immunity of the tribe, the Political Question Non-Justiciability Rule, Failure to Add USA as a Necessary Party, and statute of limitations grounds.

On December 23, 2008, Plaintiff/Appellee filed its complaint for trademark infringement and related intellectual property claims against Cesar Caballero, chief of the Miwok Nation [ER-139-150].

Caballero's Answer and counterclaim were filed on February 17, 2009 [ER-95-138], making claims for Declaratory Judgment; Infringement of Unregistered Trademark and Trade name and Unfair competition In violation of the Latham Act, 15 U.S.C. Section 1125(a); Common Law Trademark and Trade Name Infringement; Unfair Competition in Violation of the California Business and Professions Code—Fraudulent Statements/False Advertising; Intentional Interference with Prospective Economic Advantage; and Negligent Interference with Prospective Economic Advantage. It was a proposed class action by Caballero on behalf of himself and on behalf of true Miwok Class members.

The Shingle Springs Band filed a motion to dismiss [Docket No. 16-21], which Petitioners opposed [Docket No. 22].

The trial court granted the motion to dismiss Cesar Caballero's counterclaim on May 20, 2009 [See Appendix E], on the basis of sovereign immunity bar to the action; non-justiciable political question bar; statute of limitations bar; USA as a necessary party bar. Leave to amend to add the United States was denied.

On July 19, 2019, Caballero filed a motion for new trial and to vacate and or modify the judgment pursuant to FRCP Rule 59(a),(b),(c),(d), and (e) [Docket no. 345] based on several arguments that, contrary to the Trial Court's decision, actually had not been dealt with before.

The Shingle Springs Band Opposed the motion [Docket No. 349].

On August 14, 2020, the Trial Court denied the motion for new trial and or to modify vacate the verdict judgment [See Appendix F hereto].

A timely notice of appeal was filed. The Ninth Circuit affirmed the decisions of the lower court on October 22, 2021 [Appendix B hereto].

The Ninth Circuit made the following rulings regarding the tribe's sovereign immunity [see Appendix B]:

> "Caballero's counterclaims were premised on the contention that the Band had been improperly recognized by the federal government. The district court correctly dismissed the counterclaims as presenting a nonjusticiable political question. *See United States v. Holliday*, 70 U.S. 407, 419 (1865); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004)."

The Ninth Circuit made the following rulings regarding Non-Justiciable Political Question bar to the cross complaint [see Appendix B]:

> "Caballero's Rule 59(e) motion claimed that newly discovered evidence would overcome "the nonjusticiable political question rule." This evidence consisted of an exchange between Caballero and a superintendent from a regional office of the Bureau of Indian Affairs, who explained that the regional office could not act on Caballero's request to recognize his group instead of the Band and referred him to another branch of the Department of the Interior. Even assuming it was newly discovered, this evidence does not affect the settled notion that tribal recognition is reserved to the executive branch or Congress, not the courts. *See Agua Caliente Tribe of Cupeno Indians of Pala Rsrv. v. Sweeney*, 932 F.3d 1207, 1215 (9th Cir. 2019).

This petition for writ of certiorari follows to decide important issues of federal law.

By this Petition, Petitioners Cesar Caballero on behalf of himself and on behalf of Miwok Nation, and on behalf of true Miwok Class Members, seeks the grant of certiorari in both of these cases [Ninth Circuit case numbers 20-17356 and 20-16785.

## REASON THE WRIT SHOULD BE ISSUED

Petitioners submit that the questions presented qualify for review under Supreme Court Rule of Court, Rule 10(c):

> "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

### I. THE NON-JUSTICIABLE POLITICAL QUESTION DOCTRINE ISSUE

The petition for writ of Certiorari should be granted because it raises unique and important issues of Native American law, sovereign immunity, political question blocks into court; right of access to court; which is by law not subject to sovereign immunity claims.

The Trial Court and the Court of Appeals are basically telling Petitioner Caballero that he and his people can just kiss off and not have a remedy. The Trial Court and Court of Appeals was fully aware that Petitioners went to the United States Bureau of Indian Affairs ["BIA"/"US BIA"], and the

BIA expressly wrote that it has no legal authority to deal with this issue.

For the Trial Court and the Court of Appeals to still see this as an issue to be dealt with by the Executive Branch is basically turning a blind eye to Petitioner Caballero, his Miwok Nation, and the solemn promise the US BIA made to give the lands in question in Shingle Springs to the Miwok people.

This solemn promise is evidenced and is undisputed, because the US BIA did in fact place the lands into the name of the Miwok People. Petitioners are all USA BIA card-holding Miwok Native Americans. The Shingle Springs people that are occupying these premises are absolutely not Miwok at all; so, for the Court of Appeals in both cases to say that the US BIA somehow acknowledged that they were in fact Miwok is simply false. The way the BIA acknowledges a person's tribal affiliation is through the issuance of a US BIA identification card.

The current occupiers of the Shingle Springs land do not have these cards; they've admitted so in court. Petitioners have submitted that evidence to the Trial Court and to the Court of Appeals, but for some reason they're still thinking the BIA somehow said “you are Miwok.” They aren’t Miwok; they are actually from a Hawaiian group/tribe that has DNA evidence of being related to also a Puerto Rican tribe, both of which have nothing to do with Miwok.

The political question bar to civil litigation should not apply here because in this case, the big political question of should

the USA give land to the Miwok people has already been answered, and Petitioners are not litigating that question. The answer was given in the form of the deeds to the property; the USA made a decision to give these lands to the Miwok people. That is the political question that was answered in Petitioners' favor. Petitioners do not seek to undo that in any way, shape, or form. The deeds are as Petitioners would like them to be; it doesn't matter for Native Americans if they get land in trust or in fee, because federal law makes it clear that whatever that grant is, it is a perpetual grant that cannot be divested in any manner. See 28 UC Section 1322(b) and 18 USC section 1163(b). Those two codes made it clear that the distinction between trust lands and fee lands is somewhat arbitrary, and perhaps zero. The fact of the matter is that the US BIA gave these lands to the Miwok people, and a group of imposter Native Americans falsely claiming to be Miwok have taken over these lands and are excluding the true Miwok people.

All of these issues we have just stated are all questions that were previously answered by the US executive branch by making the decision to grant these lands to the Miwok people. Petitioners do not want to reexamine that; they want to enforce it as was stated in *McGirt v. Oklahoma*, 591 US ____ , 140 S. Ct. 2452, (2020):

> "Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word."

Such a big issue as the bond of the government's word should not be vaporized by a false claim of political question

immunity. A promise is a promise. In this case the promise was done; the land was given to hold that the USA can fulfill its promise, but to allow the Courts to not enforce that promise is to nullify entire act of granting these lands to the Miwok people. It is kind of a circular problem that borders on idiocy. This case should be reviewed, should be reversed, and these claims should finally at last see the light of day.

"*Ultra vires*" is defined as follows [https://www.law.cornell.edu/ wex/ultra_vires]:

> "Latin, meaning "beyond the powers." Describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters. When referring to the acts of government bodies (e.g., legislatures), a constitution is most often the measuring stick of the proper scope of power."

Case law supporting this *ultra vires* exception to sovereign immunity is found in *Al Shimari v. CACI Premier Technology*, Inc., 840 F.3d 147, 157 (4th Cir. 2016). The Trial Court would not apply immunity under a similar concept of sovereign immunity, the non-justiciable political question immunity. In *Al Shimari*, the court noted that private contractors in Iraq were engaging in conduct that, if true, would constitute war crimes and thus was *ultra vires* and not subject to the political question immunity:

> "In examining the issue of direct control, when a contractor engages in a lawful action under the actual control of the military, we will consider the contractor's action to be a "de facto military decision [ ]" shielded from judicial review under the political question doctrine. Taylor, 658 F.3d at 410. However, the military cannot lawfully exercise its authority by

> directing a contractor to engage in unlawful activity. Thus, when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine. The district court failed to draw this important distinction. Accordingly, we conclude that a contractor's acts may be shielded from judicial review under the first prong of Taylor only to the extent that those acts (1) were committed under actual control of the military; and (2) were not unlawful."

The same rule was applied in the case of *Alperin v. Vatican Bank*, 410 F.3d 532, 546 (9th Cir. 2005).

> "In the landscape before us, this lawsuit is the only game in town with respect to claimed looting and profiteering by the Vatican Bank. No ongoing government negotiations, agreements, or settlements are on the horizon. The outside chance that the Executive Branch will issue a statement in the future that has the "potentiality of embarrassment" when viewed against our decision today does not justify foreclosing the Holocaust Survivors' claims, especially when "[t]he age and health of many of the class members also presses for a prompt resolution." In re Holocaust Victim Assets Litig., 105 F.Supp.2d at 148. In sum, none of the Baker formulations is "inextricable" from the Property Claims. See Baker, 369 U.S. at 217, 82 S.Ct. 691. The Holocaust Survivors have presented a justiciable controversy.[16]"

Accordingly, the writ of certiorari should be granted.

## II. THE UNITED STATES SOVEREIGN IMMUNITY ISSUE.

Sovereign immunity does not apply to *in rem* actions. See *Upper Skagit Tribe v. Lundgren*, 584 U.S. ___, 138 S.Ct. 1649, 1653-1654 (2018):

> "Commendably, the Lundgrens acknowledged all this at oral argument. Tr. of Oral Arg. 36. Instead of seeking to defend the Washington Supreme Court's reliance on *Yakima*, they now ask us to affirm their judgment on an entirely distinct alternative ground. At common law, they say, sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign. As our cases have put it, "[a] prince, by acquiring private property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 145 (1812). Relying on this line of reasoning, the Lundgrens argue, the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in the "the character of a private individual."
>
> The Tribe and the federal government disagree… And since the founding, they say, the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983); *Ex parte Peru*, 318 U. S. 578, 588 (1943).

> We leave it to the Washington Supreme Court to address these arguments in the first instance."

In *Upper Skagrit*, this Court struggled with announcing a clear rule that these kind of disputes are *in rem* in nature, and no sovereign immunity applies. As the Court stated through Chief Justice John Roberts in his concurring opinions, the tribes can't always win [Id at 1655]:

> "But that opinion poses an unanswered question: What precisely is someone in the Lundgrens' position supposed to do? There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land —is an Indian tribe. The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right."

The United States Supreme Court's recent case of *McGirt v. Oklahoma*, 591 US _____, 140 S. Ct. 2452 (2020) is an example of a case allowing legal claims based on promises made by the USA government to Native Americans in Oklahoma [cited and quoted above].

A line of cases holds that sovereign immunity does not apply to an *in rem* action. See *Asociacion de Reclamantes v. United Mexican States*, 735 F. 2d 1517, 1521 (CADC 1984); *Green* v. *Biddle*, 8 Wheat. 1, 12 (1823) (Story, J.).

In this case, we have an excluded tribe trying to gain access into its lands that are partly in trust and partly in a fee grant. See Docket items 14-2, 14-6 and 14-7 [Declaration of Ryan Hunter, and Exhibits 4 and 5 thereto, title documents,

quoted above], and Docket no. 15-2 [Declaration of H. Franck, Exhibit F thereto, memo re data from treaties produced as exhibits to the Declaration of Ryan Hunter].

At a minimum, this case should have bene permitted to proceed as to the lands held in fee grant, and not in trust. See 28 USC section 2409a, quoted below.

The lower courts have effectively blocked this attempt through invoking sovereign immunity by requiring/ permitting the USA's claim of sovereign immunity to block the entire action. Either there will be *in rem* law that says sovereign immunity doesn't apply, or we are not. Accordingly, the writ of certiorari should be granted.

## III. THE VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT ISSUE

28 USC section 2409a gives a facially-race-based-discriminatory exception to the waiver of sovereign immunity: the exception of Native Americans with claims about Indian trust lands. 28 USC section 2409a(a) states:

> "(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. **This section does not apply to trust or restricted Indian lands,** nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666)."

The Trial Court did not rule on Petitioners' claim that the USA's statutory waiver of sovereign immunity, to the extent it excluded Native Americans from the waiver, violated the 14th Amendment Equal Protections Clause. The Ninth Circuit found that the exclusion of Native Americans from this waiver did not run afoul of the 14th Amendment Equal Protections Clause. See Appendix C and D hereto, Reporter's Transcript and November 8, 2020 Minute Order; see also Appendix A, Ninth Circuit Decision.

Such clear language of what is in effect race-based discrimination, simply cannot be allowed to stand. The Court of Appeals did deal with the issue, but made it seem like it was okay because white people with disputes over Native American lands would be similarly barred. Exactly how a white person would ever find himself with a dispute over a Native American land was actually the subject of the case of *Washington v. Davis*, 426 U.S. 229, 242-243 (1976) states:

> "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. … "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." The rule is the same in other contexts. … A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate

on the basis of race. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886)."

The USA, for example, cited the case of *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987) as standing for the proposition that the United States has a special relationship with Indian tribes and thus somehow has no business being in a quiet title claim from Indian or an Indian tribe. What stands that Court's decision on its head is a copy of the letter we received from BIA that after receiving our similar complaint to the BIA on all these issues told us that the BIA is without legal or other authority to do anything about it, and turned us away. See Decl. of H. Franck [Docket Entry No. 15-2], Ex. G thereto, April 1, 2019 letter from Troy Burdick stating in part: "There is no statute or authority that we know of that would authorize such actions on our part, nor did your client's complaint cite any authority under which we could take any such actions."

The BIA referred Petitioners to the Assistant Secretary for Indian Affairs. We followed up with the Assistant Secretary; she never responded. We followed up with the United States Senate and the United States House of Representatives, and never got a response. there can be no rational basis type argument here that since Indians have some other avenue in which to litigate these claims on the merits, they should not be allowed to go to civil court. In this instance, there is no other place we can go other than this civil court.

The Ninth Circuit's decision in both actions runs contrary to the non-alienation of Native American lands federal Laws of 25 USC section 1322(b) [the non-alienation law] and 18 USC section 1162(b). See 25 USC section 1322(b):

> `"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

18 U.S.C. 1162(b) gives the same prohibition, but makes it a crime to alienate an Indian from Indians land.

As such, Petitioners' claims to the land arise from federal treaty and federal law, and are the supreme law of the land. See the Supremacy Clause of the U.S. Constitution, Article VI, section 2; see also *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 255 (2d Cir. 2009) [treaty rights are subject to common law civil court enforcement rights].

The federal laws are inconsistent and inherently contradictory in that (a) there is one law saying you can't alienate an Indian from his lands; and (b) another law that says an Indian cannot go to court to enforce his rights to remain on his Indian lands. See 28 USC section 1322 and 18 USC section 1162 [quoted above] and see 28 USC section 2409a [quoted above]. Inconsistent and inherently contradictory laws violate the 14th Amendment's due process clause. See *Chalmers v. City of Los Angeles,* 762

F.2d 753, 758 (9th Cir.1985) [holding that inconsistent laws violate the due process clause of the 14th Amendment]:

> "We do not hold that the ordinance scheme itself was necessarily a violation of due process. Rather, the due process violation occurred in the manner in which this inconsistent scheme was implemented and enforced. Although a city is not liable on a theory of *respondeat superior* for the individual constitutional torts of its employees, it may be held to compensate for action that "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by its officials. *Monell v. Department of Social Services,* 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978)."

See also *Deegan v. City of Ithaca* 444 F.3d 135, 145-146 (2nd Cir., 2006) [citing Chalmers with approval].

There is a good example of how bizarre and arbitrary the Trial Court and the Court of Appeals were in this matter: at the end of the Ninth Circuit's opinion, the court makes a small reference to the fact that leave to amend was denied.

A dismissal without leave to amend is reviewed *de novo*. See *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004) (noting underlying legal determinations require de novo review).

Orders denying motions/requests for leave to amend is reviewed for abuse of discretion. See *Curry v. Yelp Inc.*, 875 F.3d 1219, 1224 (9th Cir. 2017).

In the *Shingle Springs Band of Miwok Indians v. Caballero* action, the amendment would have been to add the United

States as a necessary party. This was requested by Caballero, and denied by the Trial Court and affirmed by the Court of Appeals.

In the *Caballero v. United States* case [the *in rem* case], the proposed amendment would have specified that one of the parcels of the lands in Shingle Springs actually was given out of trust and as a fee grant to the Miwoks. If that were the case, that parcel of land would thus be excepted from the exception to the waiver of sovereign immunity. It just so happens that that parcel of land is the exact land that has the Red Hawk Casino right on it. So, it is almost like the whole ballgame. The lower courts should not have barred jurisdiction over an *in rem* dispute concerning Native American lands given as a fee interest and not a trust land. This is the black letter law of the statute. The lower courts just seem to ignore that Petitioners made it very clear to the courts that there was a piece of the land that was out of trust, and for some reason the courts ignored it both at the trial court level and the court of appeals level. Petitioners are hopeful that this Court will not just ignore that reality and instead allow Petitioners this opportunity to get these decisions reversed, so that the rightful owners, the true Miwok people can occupy and use the Shingle Springs lands.

Accordingly, the writ of certiorari should be granted.

## IV. THE DENIAL OF THE RIGHT TO ACCESS TO COURTS AS GUARANTEED BY THE FIRST AMENDMENT'S RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES ISSUE

In the First Amendment of the United States Constitution, we all share a right and all that imposes an obligation on the

government to allow everybody to petition the government for redress of grievances. US Constitution, First Amendment, Right to Petition for Redress of Grievances clause: "Congress shall make no law … abridging the right of the people … to petition the government for a redress of grievances." See also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) [Right to access to Court protected under the First Amendment].

The Court wrongfully blocked Petitioners' multiple attempts to claim the Shingle Springs lands and the right of the true Miwok people to occupy, reside, and use those lands. To eliminate Petitioners' First Amendment right to petition the court for redress of grievances, is itself a constitutional violation, and should not be allowed.

Accordingly, the writ of certiorari should be granted.

## CONCLUSION

Based on the foregoing, the Court should grant certiorari as to both cases and both decisions of the U.S. Court of Appeals for the Ninth Circuit [Appendices A and B hereto], as to the questions presented or such other questions as the Court may permit.

Date: January 10, 2022

Respectfully Submitted,

//s// Herman Franck, Esq.

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## CERTIFICATE OF WORD COUNT

Pursuant to Supreme Court Rule of Court, Rule 33, I hereby certify that this brief contains 7403 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

//s// Herman Franck, Esq. Date: January 10, 2022

HERMAN FRANCK ESQ.

# APPENDICES

**APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED OCTOBER 22, 2021 IN CESAR CABALLERO; MIWOK NATION (TRIBE) V. UNITED STATES OF AMERICA , USDC EDCA CASE NO. 2:08-CV-03133-KJM-AC**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-17356
D.C. No. 2:20-cv-00866-KJM-AC

CESAR CABALLERO, Individually and as representative of the Miwok Nation (Tribe); MIWOK NATION (TRIBE),
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA
Defendant-Appellee,

And

LAND SITUATED IN THE STATE OF CALIFORNIA, COUNTY OF EL DORADO, DESCRIBED AS FOLLOWS: SECTION 29, TOWNSHIP 10 NORTH, RANGE 10 EAST
Defendant,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS
Movant-Intervenor

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Submitted October 20, 2021**
San Francisco, California

Before: WATFORD and HURWITZ, Circuit Judges, and BAKER,*** International Trade Judge.

This action under the Quiet Title Act, 28 U.S.C. § 2409a(a), by Cesar Caballero concerns land that the United States holds in trust for the Shingle Springs Band of Miwok Indians (the "Band") and land that the Band owns in fee simple. The district court dismissed the case for lack of subject matter jurisdiction and denied Caballero's motion to amend his complaint. We affirm.

1. The Quiet Title Act, 28 U.S.C. § 2409a(a), "provide[s] the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 286 (1983). The qualified waiver of sovereign immunity in the Act, however, does not apply to trust or restricted Indian lands. 28 U.S.C. § 2409a(a); *see also Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987). The district court therefore properly dismissed Caballero's claims about the trust land for lack of subject matter jurisdiction.

2. The Indian lands exception to the Quiet Title Act did not deny Caballero equal protection of the laws because of his

native heritage. The Act prohibits claims against the United States by *any plaintiff* involving Indian lands. *See* 28 U.S.C. § 2409a(a). The Act does not treat Caballero differently than a non-Indian plaintiff. *See Agua Caliente Tribe of Cupeno Indians of Pala Rsrv. v. Sweeney*, 932 F.3d 1207, 1220 (9th Cir. 2019).

3. Caballero's claim to the land held in fee simple by the Band was correctly dismissed as posing a non-justiciable political question, as it was premised on the claim that Caballero's group, the Miwok Nation, should have been recognized instead of the Band as representing the Miwok people. This Court generally refuses to "intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence." *Price v. State of Haw.*, 764 F.2d 623, 628 (9th Cir. 1985); *see also United States v. Holliday*, 70 U.S. 407, 419 (1865) ("[I]t is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same."); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004) ("[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review."). For the same reason, the district court did not err in declining to allow Caballero to amend his complaint to limit it to the land held in fee simple by the Band.[1]

**AFFIRMED.**

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

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1. The Band's motion to take judicial notice is GRANTED.

**APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED OCTOBER 22, 2021 IN CESAR CABALLERO V. SHINGLE SPRINGS BAND OF MIWOK INDIANS, USDC EDCA CASE NO. 2:08-CV-03133-KJM-AC**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16785
D.C. No. 2:08-cv-03133-KJM-AC

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Plaintiff-Appellee

v.

CESAR CABALLERO,

Defendant-Appellant

MEMORANDUM *

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Submitted October 20, 2021**
San Francisco, California

Before: WATFORD and HURWITZ, Circuit Judges, and BAKER,*** International Trade Judge.

The Shingle Springs Band of Miwok Indians (the "Band") sued Cesar Caballero alleging that he had misappropriated the Band's name for his own purposes, in violation of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a), the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), and California law. The district court dismissed Caballero's counterclaims and denied a Rule 59(e) motion. We affirm.

1. Caballero's counterclaims were premised on the contention that the Band had been improperly recognized by the federal government. The district court correctly dismissed the counterclaims as presenting a nonjusticiable political question. *See United States v. Holliday*, 70 U.S. 407, 419 (1865); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004).

2. Cabellero's Rule 59(e) motion claimed that newly discovered evidence would overcome "the nonjusticiable political question rule." This evidence consisted of an exchange between Caballero and a superintendent from a regional office of the Bureau of Indian Affairs, who explained that the regional office could not act on Caballero's request to recognize his group instead of the Band and referred him to another branch of the Department of the Interior. Even assuming it was newly discovered, this evidence does not affect the settled notion that tribal recognition is reserved to the executive branch or Congress, not the courts. *See Agua Caliente Tribe of Cupeno Indians of Pala Rsrv. v. Sweeney*, 932 F.3d 1207, 1215 (9th Cir. 2019).

3. The district court held Caballero in civil contempt first for violating a preliminary injunction and later for violating a permanent injunction. Caballero claims that the contempt

citations must fall because we later reversed the summary judgment on which the permanent injunction was based, *see Shingle Springs Band of Miwok Indians v. Caballero*, 630 F. App'x 708 (9th Cir. 2015), and the Band declined to pursue further injunctive relief on remand. But this argument does not excuse his disobedience of the preliminary injunction, which was affirmed on direct appeal. *See Shingle Springs Band of Miwok Indians v. Caballero*, 424 F. App'x 696 (9th Cir. 2011). And, after being cited for contempt for disobeying the permanent injunction, Caballero filed a compliance report and was never sanctioned. His compliance with the contempt order renders the appeal moot. *See Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991).[1]

AFFIRMED.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).
*** The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

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1. Caballero's motion to take judicial notice is **GRANTED**. The Band's motion to take judicial notice is **GRANTED**.

## APPENDIX C: MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED AND FILED NOVEMBER 10, 2020 IN CASE 2:20-CV-00866-KJM-AC CABALLERO ET AL V. LAND SITUATED IN THE STATE OF CA

Notice of Electronic Filing

The following transaction was entered on 11/8/2020 at 3:32 PM PST and filed on 11/8/2020

| | |
|---|---|
| Case Name: | Caballero et al v. Land Situated in the State of CA |
| Case Number: | 2:20-cv-00866-KJM-AC |
| Filer: | |
| Document Number: | 26(No document attached) |

Docket Text:
MINUTES for MOTION HEARING held via video conference before Chief District Judge Kimberly J. Mueller on 11/6/2020. Attorney, Herman Franck, present for Plaintiffs. Plaintiff Cesar Cabalero [sic], present. Attorney, Phillip Scarborough, present for Defendant. Attorney, Sara Dutschke, present for Proposed Intervenor. The court heard oral argument as to the pending Motion to Dismiss and Proposed Motion to Intervene, ECF Nos. [14] and [19]. The court GRANTS the Motion to Dismiss, ECF No. [14] with prejudice and without leave to amend for reasons stated on

the record. The Proposed Motion to Intervene, ECF No. [19] is denied as MOOT. The Clerk of the Court is directed to enter judgment and close this case. Court Reporter: Kimberly Bennett. (Text Only Entry) (Kennison, L)

## APPENDIX D: TRANSCRIPT OF NOVEMBER 5, 2020 HEARING ON MOTION TO DISMISS IN CASE 2:20-CV-00866-KJM-AC, CABALLERO ET AL V. LAND SITUATED IN THE STATE OF CA

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Cesar Caballero, et al.,
Plaintiffs,
vs.
United States of America,
et al.,
Defendants.
_____/
Sacramento, California
No. 2:20-cv-00866-KJM-AC
Fri., Nov. 6, 2020
10:45 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE KIMBERLY J. MUELLER,
CHIEF JUDGE
---oOo---

APPEARANCES:

For the Plaintiffs: Franck & Associates
910 Florin Road, #212
Sacramento, CA 95831
By: Herman Franck
Attorney at Law
For the Defendants: United States Attorney
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Sacramento, California 95814
By: Philip A. Scarborough
Assistant US Attorney

For the Proposed Intervenor: Kaplan, Kirsch & Rockwell, LLP
595 Pacific Ave., 4th Floor
San Francisco, CA 94133
By: Sara Dutschke Setshwaelo
Attorney at Law

Official Court Reporter: Kimberly M. Bennett, CSR, RPR, RMR, CRR
501 I Street
Sacramento, CA 95814

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription

(Court called to order, 10:45 a.m.)
THE CLERK: Calling civil matter 20-cv-0866-KJM-AC, Caballero, et al. versus Land Situated in the State of California, County of El Dorado, et al. This matter is on for proposed intervenor's motion to intervene and defendants' motion to dismiss.
THE COURT: All right. Good morning. Appearing for plaintiffs?
MR. FRANCK: Good morning, Your Honor. Herman Franck for plaintiffs Cesar Caballero and Miwok Nation. And with me today also is Mr. Caballero.

THE COURT: All right. Good morning, Mr. Franck and Mr. Caballero. And for the defendant United States?
MR. SCARBOROUGH: Good morning, Your Honor. Philip Scarborough, appearing on behalf of the United States.
THE COURT: Good morning, Mr. Scarborough. For the proposed intervenor?
MS. DUTSCHKE: Good morning, Your Honor. Sara Dutschke appearing on behalf of the Shingle Springs Band of Miwok Indians.
THE COURT: All right. Good morning, Ms. Dutschke. Just, first, a housekeeping matter. The Court has received some e-mails. I can't tell who is sending them, I don't read them, but it appears that there is some attempt to communicate ex-parte with the Court, and I just want to call that out. At this point I'm not going to do anything further. The Court, when it sees something that looks like ex-parte communication, it deletes it. But if the pattern continues, I will create a
record of what I'm receiving and reserve the right to issue an order to show cause. Ex-parte communication is not acceptable. So that should be sufficient to cure the e-mails the Court is receiving.
I have just a few questions here, and I'm starting with the motion to dismiss, which may be dispositive. On the motion to dismiss, plaintiffs, of course, have the
burden, agreed, Mr. Franck, to establish jurisdiction?
MR. FRANCK: Yes.
THE COURT: And you can't dispute that I lack jurisdiction here -- subject matter jurisdiction over the claims unless the United States has waived its sovereign
immunity, correct?
MR. FRANCK: Well, we have a dispute about that, yes. We do have a dispute.

In in rem claims, sovereign immunity does not apply. That's our dispute, number one. Number two, we're not going against the USA right now. Our claim is we agree with them as far as their contention of title. We don't disagree.
So -- but, more importantly, the quiet title waiver that they have written out as a statute, as you know, interestingly exempts Native Americans from it. It allows others to do it. And we claim that race-based discrimination, that law, prohibits that. So we do not agree with the contention that sovereign immunity applies to the USA. We do not.
THE COURT: Well, the government argues that you're engaging in artful pleading. But you don't -- you do -- you do accept that the Quiet Title Act applies here, even if you have a problem with the Quiet Title Act. The Quiet Title Act waives sovereign immunity over in rem actions to quiet title with the exception of, perhaps among others, claims involving trust or restricted Indian lands, correct?
MR. FRANCK: That's what it says.
THE COURT: All right.
MR. FRANCK: Correct, that's what it says, Your Honor, but to exclude a whole race of people would violate the Fourteenth Amendment equal protection clause.
I can see by your facial expression you're not impressed with that argument. But what -- why would they just exclude a whole race of people from being able to do what is, in effect, a standard quiet title action? Why not allow us?
There is no rational basis, compelling government interest. It's a clear case of race-based discrimination on its face under the facially -- you know, facial impropriety there. So we would just point that out to the Court. We don't agree that that statute should bar it.
THE COURT: I had thought your argument rested fundamentally on a position that the land here, at least the majority of the land, was not held in trust --

MR. FRANCK: No.
THE COURT: -- but the government's record appears to clarify, with some interpretation of documents, that the land is held in trust. So you agree with that? You concede that?
MR. FRANCK: We do, Your Honor. We basically accept the recitation of title documents by Ryan Hunter.
We point out to the Court that under the -- the statute, 25 USC 1322, we have that at page 2 of our brief, we still have the right to have the land in perpetuity whether it's in trust or in fee. So that's why on our position -- our position is, when we see those title documents, we accept them a hundred percent, number one.
I point out, though, that as to 160 acres it still says fee right on it. So I don't -- you know, I'm saying, we accept it either way, because either way it is a grant in perpetuity to the Miwok Nation either way.
Our basic claim, Your Honor, is we are those people mentioned in that deed. That's us. And we should be able to be here. That's why I'm saying we don't -- there is no incursion into the United States' sovereignty because we actually aren't disagreeing with them. They did their part. They were supposed to do this land, they did it. They put it in the name -- right name. They didn't -- you know, they didn't write it wrongly. It's all correct. We're saying, we are those Miwok.
And, more significantly, those who are in possession of it now are not Miwok. And when I say Miwok I mean –
THE COURT: I understand that argument. Let me ask Mr. Scarborough, to the extent there is something not already covered by the briefing, is there anything you would like to say in response at this point?
MR. SCARBOROUGH: I think our position is set out in the briefing. I would just briefly note that the -- the equal protection argument seems to be based on an interpretation

of the Quiet Title Act that is not based on the text of the statute. The text of the statute does not prohibit Native Americans from challenging quiet title actions or bringing quiet title actions, it exempts a certain category of lands from anybody bringing those quiet title actions. So it's not discriminatory on its face, I would make that clarification. Everything else is set forth in the brief, Your Honor.

THE COURT: All right. Let me ask Mr. Franck another question.

The -- as the United States points out, the trust status applies to the majority but not all of the property, and it's not clear to the Court, what is your position with respect to the balance of the 80 acres?

MR. FRANCK: Your Honor, it's a question of whether we are a grantee or a trust beneficiary. So to the part that does clearly say trust, then we are in the category of a trust beneficiary. That's our proper -- that's how we should be designated and we fully accept that.

And if it's a grant of a fee interest, as we believe the 160 acres is, then we are in the status of a grantee. But they are saying the whole 240 acres is in trust, which is a little bit contradicted by their own documents. But, again, we're willing to accept their characteristics of all of it as trust. We don't really -- we don't need a finding -- in order -- our case is not trust or fee dependent. And I say that because of 25 USC 1322, which gives Native Americans an inalienable right to their lands, including those given in trust. That's why I'm pointing that out to the Court.

THE COURT: Let me just ask Mr. Scarborough, do I misunderstand your position? I thought your position was that the majority was held in trust, not all of the acreage.

MR. SCARBOROUGH: That's correct, Your Honor. The United States holds title to approximately 160 of the 240 acres. Those 160 acres are held in trust, and the plaintiff is

pointing out that the document refers to it as being held in fee, but I would point the Court to the Proschold case that says that that doesn't make any distinction. So, the other 80 acres were held in trust when the United States owned them, but the United States has since -- back in the sixties, fifty years ago, the United States transferred that to a different property owner. So, at this point the United States does not own that other 80 acres.
THE COURT: All right. So, Mr. Franck, assume I accept Mr. Scarborough's characterization of the record, assume for sake of argument that I grant the motion to dismiss for lack of subject matter jurisdiction, just so I'm clear, would you be telling me that you would then seek to amend to state claims based only on the 80 acres?
MR. FRANCK: Your Honor, we did request leave to amend, number one. And --
THE COURT: I'm asking, would you request leave for that purpose?
MR. FRANCK: Yes. Yes.
THE COURT: Any other purpose?
MR. FRANCK: Yes. To clarify that we do not dispute the USA's title. I would want to say that. Okay.
THE COURT: You've said it. So, this is -- it's in the record.
MR. FRANCK: Well, okay.
THE COURT: Anyone can order the transcript.
MR. FRANCK: Right. Okay.
THE COURT: All right. Let me ask Ms. Dutschke, assume for sake of argument I grant the motion to dismiss, doesn't that moot the motion to intervene and the proposed motion to dismiss from proposed intervenor?
MS. DUTSCHKE: I believe it would, Your Honor, if the entire action was dismissed. But you raise an interesting issue, which is the additional 80 acres that the United States and both the tribe agree is not held in trust by the

United States. That land -- as we point out in our draft motion to dismiss that we submitted along with our motion to intervene, that land is actually owned in fee by the tribe itself. What I would note, though, is that the questions that this Court -- that Mr. Franck and his client asked this Court to address go fundamentally to the very same questions that underlie ownership of the trust land, and that is who the United States acquired that land in trust for in the early 1900s, and what happened to that following the United States' decision to no longer recognize tribes at that time, and with regard to the 80 acres in particular, to remove that land from trust and transfer title to an individual.
Certainly there would be a chain of title in-between the United States' transfer of that land to an individual and the tribe, my client's ownership of it, but fundamentally the questions go back to exactly the same issues that are addressed
with regard to the trust land, and that is who the -- who the United States recognizes as a tribe, and who it determines to hold land in t rust for, or to take land out of trust for.
THE COURT: So, Mr. Scarborough, assuming I -- again, I'm just playing this out here. If I were to grant the motion to dismiss, deny the motion to intervene as moot, could I, on this record, grant the motion to dismiss without leave to amend because if plaintiffs attempted to amend to reach the 80 acres that would be a nonjusticiable claim?
MR. SCARBOROUGH: Yes, that's the position of the United States. It would be futile to amend the complaint because, fundamentally, if this gets -- if this case were to ever get to the merits, the merits argument that the plaintiffs are making is that the United States has recognized the wrong tribe, or recognized the wrong individuals as a tribe, and that's a nonjusticiable political question.

THE COURT: So, final word, Mr. Franck, why is that not the case, that if I do grant dismissal it should be without leave to amend, and then you can take it up, if you will?
MR. FRANCK: I understand, Your Honor. First of all, we do not dispute the USA's decision to recognize or not recognize any tribe. So that whole idea should not be any reason for this. Our issue, and our only problem, is the current people there. We don't have a problem with USA, it's the people that are there that are simply not Miwok people keeping the Miwok from being in there.
That's -- so I would like to say that, generally speaking, we do not have a problem with USA. We are not in -- we have no incursion into their sovereignty. We're not trying to do that.
Also, I would just ask the Court to look at the in rem legal authorities for that. Under in rem law, you're allowed to get to the merits of this even if there are sovereign immunity issues. That's why we re-tasked this as an in rem case. Sovereign immunity defenses do not apply.
The last thing I'd like to say about the 80 acres or 160, their records say the 160 is a fee. So that's the only thing I was really not understanding. I'm wondering if counsel has it backwards. The 80, I think, are a trust, and the 160, it says right on it, is a fee. He said a little while ago, I hope I didn't misunderstand him, that it says that, but that's -- under some case law that's not what that means. But I don't -- I don't think so. It just says fee right on it. And I think -- so I think the fee issue, when you asked about leave to amend, applies to the 160 acres, not the 80. I just wanted to clarify that.
THE COURT: Well, that clarifies your position. I don't think that's what the record shows if you read carefully the declaration explaining and interpreting the public

documents. All right. Let me just ask, anything not covered by the briefing or the discussion we've just had? Which I have to say is pretty thorough. Let me just ask Mr. Franck. And then, Mr. Scarborough, as the movant, you would have the final word.

MR. FRANCK: Your Honor, I want to let the Court understand that under the quiet title concept, it's not just title but it's also rights and interest in the land, and we claim a right and interest to occupy, use that land as a sovereign nation in perpetuity. So it's more than just who owns it.

THE COURT: All right. Mr. Scarborough, any final word?

MR. SCARBOROUGH: Nothing else that's not covered in the brief, Your Honor.

THE COURT: All right. Well, I think I understand in rem sufficiently enough to resolve the matter, and so I'm going to resolve this by bench order. And, again, if the prevailing party on the bench order wishes a more formal resolution, it can submit a proposed order within seven days.

The United States' motion to dismiss at Docket No. 14 is granted. The United States, the real party in interest, has not waived its sovereign immunity, so this Court does lack subject matter jurisdiction over the plaintiffs' claims. The Quiet Title Act does not serve as a waiver in this action, which concerns trust of restricted Indian lands under 28 US Code Section 2409(a). And I'm referencing here the cases of Block v. North Dakota, 461 US 273 at 286, 1983, and Wildman v. United States, 827 F.2d 1306-1309, Ninth Circuit, 1987. In reaching that conclusion, I have considered -- I mean, I read plaintiffs' briefing, I've considered the arguments this morning, I believe this is the correct decision.

If the complaint could be amended to address only lands held in fee simple by the tribe, this Court would be required

to answer a nonjusticiable question. I'm looking, for that principle, to the Shingle Springs case previously decided, 2020 Westlaw 4734933, where that notion is explained at pages 1 through 4. And therefore I'm granting the motion to dismiss with prejudice and without leave to amend.
And that does mean, as I've clarified with Ms. Dutschke, that the motion to intervene is denied as moot.
So that is the Court's resolution of the matter. It's final as of this bench order, but, again, if the government would like a confirming order, it can present a form for the Court's consideration.
MR. FRANCK: Your Honor, what I'd like to clarify is we would like -- the bench order, I'm sure, will be fine for us, but we would like a judgment of dismissal as well, please.
THE COURT: Well, the clerk's office follows through on the Court's -- this would close the case, no question about that. Mr. Scarborough, do you wish to present something in terms of a proposed form, or if the Court's processes take their normal course, that's sufficient for you?
MR. SCARBOROUGH: I think the Court's processes taking their normal course is sufficient for the United States, Your Honor.
THE COURT: All right. So judgment will be entered. All right. Thank you. You may sign off.
(Proceedings adjourned, 11:03 a.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kimberly M. Bennett
KIMBERLY M. BENNETT
CSR No. 8953, RPR, CRR, RMR

## APPENDIX E: ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, DATED MAY 20, 2009 IN *SHINGLE SPRINGS BAND OF MIWOK INDIANS V. CABALLERO*, USDC EDCA CASE NO. 08-CV-03133-KJM-AC

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:08-cv-03133-JAM-AC [08-cv-03133-KJM-AC]

SHINGLE SPRINGS BAND OF MIWOK INDIANS,
Plaintiff,

v.

CESAR CABALLERO,
Defendant

ORDER GRANTING SHINGLE SPRINGS BAND OF MIWOK INDIANS' MOTION TO DISMISS OR, ALTERNATIVELY, TO STRIKE CESAR CABALLERO'S COUNTERCLAIMS

Date: May 20, 2009
Time: 9:00 a.m.
Courtroom: 6

Judge: Hon. John A. Mendez

After full consideration of Shingle Springs Band of Miwok Indians' (the "Tribe") Motion To Dismiss or, Alternatively, To Strike Cesar Caballero's Counterclaims, the Supporting Memorandum of Points and Authorities, the Declaration of

Nicholas Fonseca, the Tribe's Request for Judicial Notice, the Tribe's Compendium of Unpublished Cases, all additional pleadings and papers filed in this matter, including the papers submitted by Counter-Plaintiff: andthe arguments of counsel, the Court finds there is good cause to GRANT the motion on the ground that the Court lacks subject matter jurisdiction.

First, this Court lacks subject matter jurisdiction over the action because the Tribe possesses sovereign immunity to suit, and that immunity has not been waived. Fed R. Civ. Pro. 12(b)(l). Second, this Court lacks subject matter jurisdiction to adjudicate a challenge to the status of a tribe that appears on the United States' list of federally-recognized tribes, and Mr. Caballero, and the "Indigenous Miwoks" he purports to represent, cannot state a claim for relief as a matter of law. Fed. R. Civ. Pro. 12(b)(l), (6). Third, Mr. Caballero's challenge to the Tribe's federal recognition is non-justiciable, as the Tribe's status in relation to the United States is a political question beyond the province of any court. Fed. R. Civ. Pro. 12(b)(l),(6). Fourth, to the extent Counter-Plaintiff claims he and the persons he purports to represent were wrongfully denied membership in the Shingle Springs Band, this Court's also lacks subject matter jurisdiction to adjudicate it, because only the Tribe itself is empowered to grant membership, and no claim for federal relief can be stated. Fed. R. Civ. Pro. 12(b)(l), (6). Fifth, Mr. Caballero's challenge is time-barred, since, as a matter oflaw, he and other members of the Tribe have been aware of the Tribe's federal recognition for 30 years. Fed. R. Civ. Pro. 12(b)(6). Seventh, Mr. Caballero's countersuit cannot state a claim upon which relief can be granted because, as a matter of law, a federally-recognized Indian tribe cannot be enjoined from using itsown federally-recognized name, under the guise of trademark law or otherwise. *Id* Finally, the United States is a necessary and indispensable party to Mr. Caballero's

challenge of the United States' recognition of the Shingle Springs Band and his claim to their lands, but cannot be joined because of its immunity, requiring dismissal. Fed. R. Civ. Pro. 12(b)(7).

Accordingly, pursuant to Federal Rules of Civil Procedure 12(b)(1), the Court hereby orders that Counter-Plaintiff's complaint is, in its entirety, DISMISSED WITH PREJUDICE forlack of subject matter jurisdiction. In addition, the Court finds that dismissal also would be warranted if it had subject matter jurisdiction, because Counter-Plaintiff has failed to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(6) andbecause the United States is an indispensable party that cannot be joined, requiring dismissal under Rule 12(b)(7).

IT IS SO ORDERED.

Dated May 20, 2009 //s// John A. Mendez
The Honorable John A. Mendez
United States District Court Judge

## APPENDIX F: ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, DATED AUGUST 14, 2020 IN *SHINGLE SPRINGS BAND OF MIWOK INDIANS V. CABALLERO*, USDC EDCA CASE NO. 08-CV-03133-KJM-AC

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:08-cv-03133-KJM-AC

SHINGLE SPRINGS BAND OF MIWOK INDIANS,
Plaintiff,

v.

CESAR CABALLERO,
Defendant

ORDER

Defendant Cesar Caballero moves to amend[1] the court's July 8, 2019 order dismissing his counterclaims. Plaintiff opposes, ECF No. 349, and defendant has replied, ECF No. 353. For the reasons below, the court DENIES the motion.

I. BACKGROUND

On February 17, 2009, defendant filed his answer to plaintiff's original complaint, alleging counterclaims against plaintiff Tribe related to the governing council's allegedly false claims that they are "Shingle Springs Miwok" Indians. *See* Answer, ECF No. 11, at 7–28.

Plaintiff moved to dismiss the claims, ECF No. 16, and the court granted the motion to dismiss on May 20, 2009, ECF No. 33. In its order, the court dismissed plaintiff's counterclaims with prejudice on the basis that "Mr. Caballero's challenge to the Tribe's federal recognition is simply non-justiciable, as the Tribe's status in relation to the United States is a political question beyond the province of any court." *Id.* at 2 (citing Fed. R. Civ. P. 12(B)(1), (6)). In direct contravention of this order, defendant included virtually the same counterclaims in his answer to the third amended complaint, styled "affirmative answers" with a "prayer" for judgment. ECF No. 222.

On September 17, 2012, plaintiff moved to dismiss or strike the re-pleaded counterclaims. ECF No. 226. The court did not resolve the motion to dismiss or strike until after the court granted summary judgment, ECF No. 259, defendant appealed the decision, ECF No. 266, and the Ninth Circuit reversed and remanded, ECF No. 302. The court ultimately granted plaintiff's motion to dismiss the counterclaims "because they are identical to defendant's original counterclaims which were dismissed with prejudice." July 8, 2019 Order, ECF No. 339. In other words, the court's 2019 order was based on the conclusion it reached in the 2009 order. The court then entered judgment in the case. ECF No. 341.

On July 19, 2019, more than ten years since the court originally dismissed defendant's counterclaims, defendant moves to amend the court's July 8, 2019 dismissal order under Rule 58 on the basis that new information shows the May 20, 2009 order was incorrect. Mot., ECF No. 345, at 4 ("The motion is based on the fact that the Court's previous order dated May 20, 2009 dismissing [sic] Cesar Caballero's

counterclaim on the grounds of the nonjusticiable political question doctrine." (citing May 20, 2009 Order, ECF No. 33, at 2)). On October 1, 2019, defendant also filed a notice of related case in El Dorado County, ECF No. 354 (citing El Dorado County Superior Court case no. PC-20190492), and on November 22, 2019, he filed a notice of default proceedings in the aforementioned state case against "current tribal council," ECF No. 355. On December 12, 2019, the proposed plaintiff-intervenor, the Wopumnes Nisenan-Mewuk Tribe ("Wopumnes Tribe"), filed a "motion for waiver of fees," ECF No. 358. The court resolves both motions below.

## II. JURISDICTION

The court has jurisdiction to decide this motion, which was filed just before the Wopumnes Nisenan-Mewuk Tribe appealed the court's July 8, 2020 order granting plaintiff's motion to dismiss. *See* Not. of Appeal, ECF No. 348. The Ninth Circuit has since dismissed that appeal for failure to prosecute. ECF No. 357. Accordingly, the court resolves the motion to amend below.

## III. DISCUSSION

Rule 59(e) provides, "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). Here, defendant filed his motion eleven days after the court's entry of judgment, and so it is timely. *See* ECF Nos. 340–341, 345. "Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v.*

*Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal quotations marks and citation omitted). The burden on the moving party is high. *See, e.g.*, *S.E.C. v. Pattison*, No. C-08-4238 EMC, 2011 WL 2293195, at *1–2 (N.D. Cal. June 9, 2011). The Ninth Circuit has articulated four grounds upon which a Rule 59(e) motion may be granted:

(1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.

*Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (citation omitted). The Rule "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been made prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation omitted).

Defendant argues the court should amend its previous dismissal order, because defendant now has evidence to show the federal Bureau of Indian Affairs (BIA) does not have the authority to determine defendant's claim regarding the current governing council of the Shingle Springs Band of Miwok Indians. *See* Mot. at 8. Primarily, defendant bases his motion on a statement made by BIA Superintendent Troy Burdick in a letter dated April 1, 2019, in which he purportedly states, "There is no statute or authority that we know of that would authorize such actions on our part, nor did your client's complaint cite any authority under which we could take such action. As such, we are unable to act on your client's request for relief as described in the complaint." Mot. at 8 (citing Franck Decl., ECF No. 345-2, Ex. C[2]). Defendant argues this shows the Executive Branch "cannot and will not determine these issues," and therefore the court

cannot avoid ruling on them based on the political question doctrine. *Id.*

Regardless of the merits of defendant's argument, the motion must be denied because it is an attempt to use Rule 59 to "relitigate old matters [and] raise arguments [and] present evidence that could have been made prior to the entry of judgment." *Exxon Shipping Co.*, 554 U.S. at 485 n.5. Defendant claims to be challenging the court's 2019 dismissal order, but admits that, in truth, he is challenging the court's conclusion in the 2009 dismissal order, upon which the 2019 order is based. Plaintiff provides no explanation why the "evidence" on which he bases the motion could not have been obtained in 2009, when the issue was initially decided, nor why it was not presented to the court before it issued its most recent order. The court notes in particular the BIA correspondence is dated April 1, 2019, two months before the court issued its June 2019 order. *See* Franck Decl., Ex. D. Accordingly, the court finds defendant's Rule 59 motion seeks to "relitigate old matters, or to raise arguments or present evidence that could have been made prior to the entry of judgment." *Exxon Shipping Co.*, 554 U.S. at 485 n.5. It must therefore be DENIED.

Because the court need not rely on the materials referenced in defendant's request for judicial notice, filed in conjunction with his motion to amend, the court DENIES the request as moot.

IV. Motion to Proceed In Forma Pauperis

As mentioned above, on August 8, 2019, proposed plaintiff-intervenor, the Wopumnes Tribe appealed the court's order granting plaintiff's motion to dismiss. Not. Of Appeal, ECF No. 348. On December 12, 2019, the Ninth Circuit dismissed the appeal for failure to prosecute. ECF No. 357. That same

day, the Wopumnes Nisenan-Mewuk Tribe filed an application in this case to "proceed in district court without prepaying fees or costs." ECF No. 358. The application is DENIED as MOOT given the Ninth Circuit's dismissal of the Tribe's appeal; the Tribe is not a party to this case, as its motion to intervene was denied, ECF No. 339.
This order resolves ECF No. 345 and ECF No. 358. The case remains closed.

IT IS SO ORDERED.

DATED: August 13, 2020.

//s// Kimberly J Mueller

Chief United States District Judge

1. Defendant's motion is styled "Motion for New Trial and Motion to Alter and Amend the July 8, 2019 Judgment of Dismissal." ECF No. 345. Because this case has never gone to trial, the court interprets this as a motion to amend the July 8, 2019 dismissal order.

2. It appears the letter defendant refers to is actually attached as Exhibit D to the Franck Declaration. *See* ECF No. 345-2 at 28